Supreme Court, U.S.
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No. 90-5319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL MCNEIL,

Petitioner,

v.

WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

The basis of petitioner's appeal is the right of an accused who has invoked the right to counsel at an initial appearance and remained in continuous custody to be protected from police initiated interrogation. There is no factual dispute that on May 22, 1987, McNeil made an appearance before a magistrate, that he had counsel at that hearing, and that Milwaukee County Sheriff Detective Joseph Butts initiated an interrogation of the petitioner just hours after petitioner had appeared with counsel. (Resp. Br. 1).[1]

Wisconsin and Amicus Curiae United States (herein after referred to as "United States") approach petitioner's appeal from different points of view. Wisconsin views the critical issue proposed by petitioner to be whether appearance with counsel at the magistrate's hearing invoked his Fifth Amendment right to counsel. (Resp. Br. 18). United States frames the issue much broader than that proposed by petitioner. United States poses the question whether "law enforcement officers may initiate custodial interrogation of a suspect who is represented by counsel on an unrelated offense." (Br. of United States as Amicus Curiae supporting Respondent, "U.S. Amicus Br. 1"). Framing the issue in such broad language allows the United States to argue to this Court *Maine* v. *Moulton*, 474 U.S. 159 (1989) which is not applicable. The

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[1] Respondent makes much of hearsay testimony from Detective Butts that petitioner's girlfriend informed Butts, while petitioner was in Omaha, but before he had turned himself into authorities, that petitioner wanted to talk with Butts. (R. 43-9). Caledonia authorities had been informed that McNeil was taken into custody on May 13, 1987. (R. 47-12). Consequently the girlfriend's statement was made at least 7 days prior to McNeil's contact with any Wisconsin police authorities, and in any event does not serve as evidence that petitioner initiated the interrogation of May 22, 1987.

issue of custody which is paramount in this case did not exist in *Moulton*. (U.S. Amicus Br. 6, 11). The issue before the Court is not whether an accused who is released on bail may be re-arrested and/or interrogated by police on unrelated charges even though he has counsel. The issue is whether the petitioner, who was in custody when he invoked his right to counsel at an initial appearance, may be subjected to police initiated interrogation while he remains in continuous custody.

Because of their differing approaches, the United States and Wisconsin argue at cross purposes when dealing with the issue of when a petitioner may invoke his right to counsel. Wisconsin asserts many times in its brief that a Fifth Amendment invocation of counsel may take place only within an interrogation context. (Resp. Br. 21-28). The United States, suggesting that petitioner invoked his Fifth Amendment right to counsel at his initial appearance only for the charged offense, nevertheless assumes that a suspect may invoke his Miranda right "not to be questioned outside the presence of counsel *at any time while he is in custody.*" (Emphasis Added) (U.S. Amicus Br. 14 n.5).

The contradictory approaches concerning when invocation of counsel may occur results in Wisconsin and the United States proposing different rules. Wisconsin proposes a bright-line rule that "an accused who appears with counsel at a court proceeding on a charged offense does not thereby invoke his Fifth Amendment right to counsel and consequently does not, at least in so far as unrelated, uncharged offenses are concerned, trigger the *Edwards* rule forbidding any further police initiated interrogation." (Resp. Br. 47-48). The United States, aware of the implication of its assumption that invoking Miranda rights can occur at any time when a suspect is in

custody, chooses form over substance proposing a rule that ignores previous decisions of this Court. See *Michigan* v. *Jackson*, 475 U.S. at 633 n.7; (Average person "should not be expected to articulate why or for what purposes he is seeking counsel."); *Arizona* v. *Roberson*, 486 U.S. 675 (1988) ("A suspect's request for counsel should apply to any question the police wish to pose follows from *Miranda* and *Edwards*."); *Minnick* v. *Mississippi*, 111 S.Ct. 486, 491 (1990) ("Officials may not reinitiate interrogation without counsel present whether or not the accused has consulted with his attorney."). United States rejects a bright-line rule and asks the Court to draw a line in this case that:

> "Where the suspect has done *no more* than request or accept representation on one charge, that conduct should be deemed to invoke the defendant's right to counsel for purposes of interrogation with respect to the charged offense, but not as to interrogation on other subjects." (U.S. Amicus Br. 15) (Emphasis Added).

Thus, United States suggests a case by case analysis to determine if an accused has invoked counsel for purposes of the *Roberson* rule.

Wisconsin, United States, and all Amicus Curiae (Illinois, Florida, Americans For Effective Law Enforcement, and Appellate Committee of the California District Attorney's Association) argue that petitioner's proposed rule would impede investigation of unsolved crimes without sufficient justification. Wisconsin and all Amicus Curiae fail to provide the Court with any authority for this assertion other than appeals to anecdotal authority (Ill. Amicus Br. 8) and "common sense." (Amicus Curiae Americans For Effective Law Enforcement Br. 7) (Resp. Br. 37). This repeated argument against bright-line rules

that law enforcement will be hindered was offered to this Court and rejected in *Edwards*, *Jackson*, *Minnick*, and *Roberson*, the case which requires reversal of the Wisconsin ruling below.

ARGUMENT

I. McNEIL'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

A. Respondent Misinterprets This Court's Decision In *Michigan* v. *Jackson*.

The respondent puts forward what it calls a principled approach to determining whether or not petitioner has invoked his Fifth Amendment right to counsel. The principled approach that respondent offers is built on the foundation of when interrogation is taking place. "The request for counsel would have to be made by an in-custody suspect in response to the administration of the warnings prescribed in *Miranda* or in direct anticipation of, or during, interrogation." (Resp. Br. 23). This "principled" approach serves as respondent's analysis of the language in *Miranda* which says in part that "If, however, [the defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda* v. *Arizona*, 384 U.S. 436, 444-45 (1966). The United States apparently does not agree with respondent's "principle" and concedes that, "A suspect may invoke his right not to be questioned outside the presence of counsel at any time while he is custody (and therefore that petitioner could have invoked his Miranda rights for all purposes at the initial appearance on the armed robbery charge) . . . ." (U.S. Amicus Br. 14 n.5).

Presumably, if McNeil, upon his arrest had stated to the police prior to any intimation of interrogation from the

police that he wished to have an attorney, the police would have refrained from interrogating him and the respondent would not disapprove of the police non-interrogation. The respondent though is suggesting that a suspect who invokes his right to counsel before a magistrate should be treated differently from a suspect who invokes his right to counsel to a police officer. In support of its contention that the principle of interrogation should govern this case, the respondent scorns petitioner's reliance upon the well accepted principle of constitutional interpretation ". . . to give a broad, rather than narrow interpretation to a defendant's request for counsel." *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986), citing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). Respondent refers to this concept as "unprincipled." (Resp. Br. 49).[2] Indeed, this principle of constitutional interpretation was affirmed by this Court in *Connecticut* v. *Barrett*, 479 U.S. 523, 529 (1987), which respondent relies upon for its analysis of interpreting an ordinary person's view of a suspect's invocation of counsel. (Resp. Br. 28-30).

Respondent appears troubled that this settled principle of Constitutional analysis, as outlined in *Barrett* and *Jackson* ignores the differences between the Fifth and Sixth Amendments. (Resp. Br. 25). Contrary to respondent's fears, this Court has recognized the difference between Fifth and Sixth Amendment rights to counsel. This has not prevented the Court from applying a rule of one Amendment to a fact situation arising in the context of the other Amendment. See *Miranda* v. *Arizona*, 384 U.S.

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[2] Contra: The United States concedes that this is a principle: "It is true that this court has said that principles of waiver favor 'a broad, rather than a narrow interpretation to a defendant's request for counsel.'" (U.S. Amicus Br. 14).

475 (Applying Sixth Amendment standard of waiver to Fifth Amendment); *Patterson* v. *Illinois*, 487 U.S. 285, 299, n.12 (1988) (Utilizing Miranda warnings in a Sixth Amendment context: ". . . this Court has recognized that the waiver inquiry focuses more on the lawyer's role during questioning rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding."); *Michigan* v. *Jackson*, 475 U.S. 625 (Superimposing a Fifth Amendment analysis of *Edwards* onto the Sixth Amendment). In *Jackson* this Court put to rest respondent's "principled" approach that the invocation of the Fifth Amendment right to counsel can only occur in the context of interrogation. See *Michigan* v. *Harvey*, 110 S.Ct. 1176 (1990) ("Reasoning that 'the Sixth Amendment right to counsel at a post arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation,' the court in *Jackson* concluded that the *Edwards* protections should apply when a suspect charged with a crime requests counsel *outside the context of interrogation*"). (Emphasis Added).

The respondent's formulation that counsel can only be invoked in the Fifth Amendment context in response to Miranda warnings, or in direct anticipation, or during interrogation, is also meaningless. Most citizens presume that if they are arrested they are going to be subjected to police interrogation. Whether that interrogation takes place immediately, or at a later stage, is largely irrelevant. Most ordinary citizens would presume that the police, after having made an arrest, will at some time in the future, subject the arrestee to some form of interrogation. This presumption is based not only on the realities of the criminal justice system, but also on the media which bombards the public on a daily basis with newspaper

reports, movie and television crime shows portraying police and citizens in various stages of the criminal process where interrogation is commonly presented to the public as a critical endeavor. To assert as respondent does that the request for Fifth Amendment counsel pursuant to Miranda has to be made at least in direct anticipation of interrogation, if given its ordinary meaning, would mean that any request for counsel after arrest while in custody is in direct anticipation of interrogation.

Respondent asserts contrary to *Jackson*, that there is no basis for finding that a defendant invokes his Fifth Amendment right to counsel when he appears with counsel at a court hearing on a charged offense. (Resp. Br. 30). Respondent appears to reiterate what the State of Michigan argued to this Court in *Michigan* v. *Jackson*, U.S. at 632. In that case the State also relied on the factual differences between a request for counsel during custodial interrogation and the request for counsel at an arraignment. Respondent argues that the ordinary person would perceive that requesting counsel would be for seeking the assistance of counsel only as to the particular charge being prosecuted. (Resp. Br. 33). But the ordinary person that the respondent refers to is the average person noted by this Court in *Michigan* v. *Jackson*, U.S. at 633 n.7. The average person does not appreciate the subtle distinctions between the Fifth and Sixth Amendments. The average person who requests an attorney, either before a police officer or a magistrate, does not know which constitutional right he is invoking. The average person is not expected to articulate exactly why or for what purposes he is seeking counsel.[3]

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[3] The United States apparently agrees that this Court has "suggested than an accused 'should not be expected to articulate exactly why or for what purposes he is seeking counsel.'" (U.S. Amicus Br. 14).

This Court has unequivocally agreed that accused's request for counsel need not articulate as to why or for what purposes he is seeking counsel. The fact that the Michigan court made the observation that an average person does not understand the distinctions between the Fifth and Sixth Amendments, but decided that the Fifth Amendment had not been invoked in *Jackson* does not detract from the accuracy of that court's observation. This Court was well aware that the Michigan court had not found a Fifth Amendment invocation. *Jackson*, U.S. at 630 n.4. But the Michigan court's astute observation of the average person's undifferentiated request for counsel gave substance to the application of the *Zerbst* criteria (presumption against waiver of fundamental constitutional rights; *Zerbst*, U.S. at 464) in the *Jackson* case. This Court recognized that "When an accused requests an attorney either before a police officer or a magistrate he does not know which constitutional right he is invoking" was the ambiguity that triggered the "settled approach to questions of waiver that requires us to give a broad, rather than a narrow interpretation of a defendant's request for counsel." *Jackson*, supra at 633.

The United States asserts, "Nothing in *Jackson* suggests that a request for the appointment of counsel should be construed as an invocation of counsel not only with respect to the charged offense, but with respect to all possible subjects of interrogation as well." (U.S. Amicus Br. 17). This is not correct. The holding of *Jackson* was not so constricted:

> "We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Jackson*, U.S. at 636.

Of course, *Jackson* involved the Sixth Amendment in terms of how the case was presented and argued to the court. The defendant had been interrogated and convicted of the charge for which he appeared before a magistrate when he requested counsel. The analysis that led to the *Jackson* holding was grounded in part on the ambiguity of the assertion by the defendant of his right to counsel and whether that assertion was pursuant to the Fifth Amendment or the Sixth Amendment. This Court utilized the broad rather than narrow constitutional interpretation of a defendant's request for counsel. For the United States to argue that nothing in *Jackson* suggests that the request for appointment of counsel goes beyond the charge for which the petitioner made his appearance is to ignore the Court's analysis underlying its holding. What the United States suggests is that the petitioner has invoked his Fifth Amendment right to counsel, but the Fifth Amendment right to counsel should be limited to the charge for which he appeared. (U.S. Amicus Br. 15).

B. *Arizona* v. *Roberson* Mandates Reversal Of McNeil's Conviction.

Respondent does not directly deal with the rule of *Roberson*. (Resp. Br. 18 n.4). Respondent argues that *Roberson* is inapplicable based on its view of the petitioner's state of mind: "A defendant appearing with counsel at a court hearing on a particular charge would ordinarily view the invocation of the right to counsel implicit in such appearance as an invocation of the right to counsel that the Sixth Amendment affords to assist him in dealing with the State of that particular charged offense. He would not view it as an invocation of his right to counsel at interrogation on other uncharged offenses that Miranda affords." (Resp. Br. 41). This position rests on the mistaken notion that an ordinary person (unlike the *Jack-*

son court's characterization of the average person) understands the subtle distinctions between the Fifth and Sixth Amendments when appearing at an initial appearance or arraignment.

Respondent discusses *Roberson* indirectly by commenting that the *Edwards* rule was designed to protect an accused in police custody "from being badgered" by the police. (Resp. Br. 40). Quoting from the dissent in *Roberson*, the respondent notes that, "This court's concern in that regard [badgering] is that 'the suspect may believe his rights are fictitious if he must assert them a second time. *Arizona* v. *Roberson*, 486 U.S. at 690 (Kennedy, J. dissenting, but describing the majority's concern).'" (Resp. Br. 40-41). Respondent mistakenly believes that "badgering" is not a concern in the post-initial appearance context since the petitioner having appeared with counsel "knows" that he has counsel only for the charged offense. This is incorrect. The concern of badgering by law enforcement authorities is just as great, if not greater, at the post initial appearance phase of interrogation as it is at the pre-accusatory stages. As this court noted in *Minnick* v. *Mississippi:*

> "A single consultation with an attorney does not remove the suspect from *persistent attempts by officials* to persuade him to waive his rights, or from the *coercive pressures that accompany custody and that may increase as custody is prolonged.*" *Minnick*, S.Ct. at 491 (1990) (Emphasis Added).

In the present case, contrary to respondent's assertion that petitioner's invocation of counsel would overcome any suspicion that his right to counsel was fictitious, petitioner was precisely in the position of facing that prospect. He had been advised in Omaha of his Miranda rights. One of the rights read to him was as follows:

> "If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so choose." (J.A. 5).

Petitioner chose to remain silent and did not invoke his right to counsel at that time. Two days later though he did appear with counsel at an initial appearance. Under those circumstances, was it unreasonable for petitioner to presume that he was receiving the counsel that he was promised he could have if he wanted before he was interrogated? Did petitioner understand the subtle distinctions between the Fifth and Sixth Amendments when he appeared at his initial appearance and was offered the services of an attorney? Having accepted and appeared with counsel, petitioner was within hours confronted with a police initiated interrogation. Was it unreasonable that an average person such as petitioner would wonder whether the right to counsel which had just been conferred on him was more a promise than a reality?

The concern of the court in *Roberson* for a bright-line rule to provide clear and unequivocal guidelines to law enforcement is appropriate in the present case. The bright-line rule presented by the respondent is contrary to the well-settled principle of constitutional interpretation of invocation of rights.[4] Respondent's proposed rule would preclude courts from inquiring as to whether or not a defendant who had invoked his right to counsel had intended to invoke his Fifth Amendment right. Indeed, it would prevent a defendant at his initial appearance or arraignment from invoking his Fifth Amendment right.

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[4] "An accused who appears with counsel at a court proceeding on a charged offense does not thereby invoke his fifth amendment right to counsel and consequently does not, at least in so far as unrelated, uncharged offenses are concerned, trigger the *Edwards* rule forbidding any further police-initiated interrogation." (Resp. Br. 48).

The rule would result in the anomalous situation of the defendant having to wait until the police arrived to interrogate him before he could invoke his Fifth Amendment right even though he had previously appeared with counsel or requested counsel at an initial appearance or arraignment. Such a bright-line rule would effectively give the police more power to confer the right to counsel than that possessed by a magistrate or judicial officer.

The United States does not propose a bright-line rule, but rather a rule that would result in a case by case analysis as to whether or not a defendant had intended to invoke the *Roberson* rule when he had accepted or requested counsel at an initial appearance. This rule would create additional burdens for courts, defendants, police, and defense attorneys. The easiest situation to analyze would be one where defendant appears with counsel at an initial appearance. Counsel could invoke Fifth Amendment rights on behalf of his client. Many defense counsel would give such advice, but there would always be those who would not. If counsel did not advise his client that he should invoke his *Roberson* rights, counsel would face potential ineffectiveness of counsel proceedings. Police would have to discern from the record whether *Roberson* rights were invoked before initiating interrogations.

A more difficult situation arises with individuals who have been advised of their right to counsel, have requested counsel, but have not yet conferred with counsel. They would be at a distinct disadvantage from those defendants who make a first appearance with counsel. A proper approach would be for the magistrate to inquire at the initial appearance pursuant to *Michigan* v. *Jackson* whether the accused requesting counsel was invoking the Fifth and/or Sixth Amendment, and to make a satisfactory record that the defendant understood what were his Fifth and Sixth Amendment rights. A notation on the record would be required to allow the police to know whether or not the defendant had been so advised and whether he had made a knowing, intelligent and voluntary waiver of the Fifth Amendment right. In short, absence of petitioner's bright-line rule would result in numerous hearings and certain confusion amongst the various States and jurisdictions in administrating the rule proposed by United States.

Respondent and all Amicus Curiae minimize the central role that custody plays in applying Miranda and its progeny.[5] United States proposes that there is no material difference between a person who has been charged in one case and is a suspect in a second, and a person who is a suspect in both cases. (U.S. Amicus Br. 22). This ignores the consequences of being in custody as a result of being charged with an offense and being unable to post bail. A person who is a suspect in two cases has still not been formally charged and had bail set at an initial appearance, or been confined for any appreciable period of time. United States ignores this Court's admonition in *Minnick* that coercive pressures accompany custody and may increase as custody is prolonged. *Minnick*, Ante Page 10. United States ignores that petitioner had been in custody since May 13, 1987, and that bail had been set at $25,000.00 which effectively meant that petitioner would not be free from custody in the foreseeable future. Petitioner was incarcerated in the Milwaukee County Jail

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[5] "In subsequent decisions [after Miranda], the court specifically stressed that it is the *custodial nature* of the interrogation which triggers the necessity for adherence to the specific requirements of its Miranda holding." *Beckwith* v. *United States*, 425 U.S. 341, 346 (1976) (Emphasis Added) (Cites omitted).

governed by the rules of a typical holding institution. These rules dictated what petitioner could wear, what he could read, what he could eat, whom he could see and when he could see them, when he could make phone calls and from whom he could receive phone calls, when he could go to bed, who could interrogate him, (whether it was the Milwaukee County Sheriff, the Caledonia Police Department or the City of Milwaukee Police Department) and when such interrogations would take place. Any custody is a limitation of one's freedom. However, custody experienced by a charged defendant, who is a prisoner after bail has been set, is more severe than that faced by an uncharged suspect in a police station. To argue as United States does that having been charged in a separate case would not affect a person's susceptibility to coercive interrogation is to ignore the realities of post appearance detention.

United States suggests that representation by counsel on a separate case would make it easier rather than harder to invoke the right to counsel in response to Miranda warnings thereby negating the need for *Roberson* to be applied in the present situation. United States position is contrary to *Minnick* which noted with approval language from *Miranda:*

> ". . . [e]ven the preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process." *Miranda*, U.S. at 470; cited in *Minnick*, S.Ct. at 491.

Petitioner had appeared with counsel and remained in continuous custody. Officials should not have reinitiated interrogation without counsel present. *Minnick*, S.Ct. at 491.

The respondents and all Amicus Curiae argue that application of *Roberson* to the issue before the Court will

create significant costs for law enforcement,[6] and deprive suspects of an opportunity to clear up mistaken accusations and suspicions.[7] The arguments presented in the various briefs in support of these propositions are anecdotal and not substantiated by any studies or surveys. These arguments have been presented to and rejected by this Court in most of the key cases cited by the parties in their respective briefs: *Edwards*, *Roberson*, *Jackson*.

Adoption of petitioner's bright-line rule is not a negation of the balancing of benefits which is utilized by this Court in creating per se rules. Indeed, petitioner's proposed rule would have less impact on law enforcement than any previous per se rules adopted pursuant to *Miranda*, *Edwards* and *Roberson*. The number of defendants affected is certainly less after post-initial appearance interrogations than at station house interrogations. On the other hand, the duration and type of custody experienced by post-initial appearance defendants is more intense than that experienced by individuals who are initially entering the criminal justice process at the police station. The intense nature of the custody undergone by post-arraignment defendants resulting in increased coercive pressure is reason enough to give those defendants the same Fifth Amendment right given to suspects who have not yet been processed in the courts. The crucible of increased pressures of custody after requesting and/or appearing with counsel at an initial appearance or

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[6] (Resp. Br. 37), (U.S. Amicus Br. 20), (Amicus Appellate Committee of the California District Attorney's Association Br. 16).

[7] Amicus Illinois argues that suspects would be deprived of the ability to learn of new accusations. (Ill. Amicus Br. 9). This argument was presented by the United States in *Roberson* and was rejected by this Court. *Roberson*, U.S. at 687, also (AFELE Amicus Br. 7).

arraignment is sufficient to trigger the requirements of *Miranda-Roberson*. Nothing in petitioner's proposed rule detracts from this Court's principles in creating per se rules:

> "Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurance that the coercive pressures of custody were not the inducing cause. The *Edwards* rule sets forth a specific standard to fulfill these purposes, and we have declined to confine it in other instances. See *Arizona* v. *Roberson*, 486 U.S. 675 (1988)." *Minnick* v. *Mississippi*, S.Ct. at 492.

CONCLUSION

The judgment of the Wisconsin Supreme Court affirming McNeils conviction should be reversed.

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